No previous conviction but Secret Society (Group 18) 'Chean Gi Ho' fighter. Admitted.

Convicted and sentenced 4 months imprisonment."

In his grounds of decision the learned magistrate said:

"I am of the view that offences of this nature are among the worst of the offences against the person and people who indulge in it are savages who deserve no mercy as they have shown no mercy to the people they have attacked. It is absolutely no mitigation to say that this is the appellant's first offence. The act shows a callous disregard of the consequences which may even be death to the victims.

Although he had no previous conviction, the appellant admitted that he was a fighter in the Group 18 'Chean Gi Ho' Secret Society. Having regard to all the circumstances of the case, I felt strongly that a severe penalty was called for. I decided that a sentence of four months' imprisonment was a fair and suitable punishment."

S. K. Lee for the appellant.

Francis T. Seow (Senior Crown Council) for the respondent.

Wee Chong Jin C.J. (delivering oral judgment): I can only go on the record. The appellant was charged under section 148 of the Penal Code, that is the rioting section, convicted on his plea of guilty and sentenced to imprisonment for four months.

The facts outlined to the magistrate were admitted by him and so far as I am concerned I am in no position to receive evidence other than those that appear on the record as regards the facts of the case.

The only thing that has troubled me of course is the fact that after he had appealed for leniency in mitigation the prosecutor would have appeared to inform the magistrate that although he had no previous conviction he was a fighter in a secret society. That to my mind is entirely irrelevant in so far as sentence is concerned and in his grounds of decision the learned magistrate has referred to that alleged defect in his character and it would appear to have affected him in his assessment of the sentence to be im posed.

I would therefore allow the appeal to the extent that the sentence is reduced to three months' imprisonment.

Sentence reduced.

RE YEOW HEAP SENG
Ex parte THE OFFICIAL ASSIGNEE

[O.Bk.J. (Choor Singh J.) March 13, 1965]

[Singapore — In Bankruptcy No. 73 of 1963]

Bankruptcy — Fraudulent conveyance to defraud creditors — Subsequent bankruptcy of vendor — Validity of conveyance — Doctrine of relation back — Whether act of bankruptcy related back to date of signing fraudulent conveyance — Bankruptcy Ordinance (Cap. 11), ss. 3, 46, 47, 51 and 53.

Mortgage — Sale of property under — Purchase price utilised to discharged — Purchaser entitled in equity.

L mortgaged his shophouse to the Bank of Singapore on August 12, 1960 to secure his firm's overdraft on its current account with the bank up to a limit of $22,000. The firm was in serious financial difficulties in February 1963. *L* then consulted one *Y* for the sale of the mortgaged property in order to pay the bank's overdraft. On February 7, 1963 an agreement for sale of the mortgaged property for $30,000 was entered into by *L* and one *T* and on February 22, 1963 *L* signed the assignment in escrow transferring the property to *T* pending the completion of the reconveyance by the bank. The reconveyance was executed by the bank on March 2, 1963 and the sale by *L* to *T* was completed on the same date. An order was made against the firm on April 19, 1963 and adjudication orders were made against *L* and *S* as partners of the firm on June 14, 1963. The third partner one *H* was adjudicated a bankrupt on June 21, 1963.

The official assignee now applied by way of motion for a declaration that the assignment to *T*, the respondent herein, dated March 2, 1963 was void on the grounds that it was not made in good faith or for valuable consideration and that the assignment was an act of bankruptcy because it was fraudulent, that *L's* bankruptcy related back and that his property divisible among his creditors included the shophouse.

Held: (1) the evidence clearly indicated that the respondent accepted the assignment with full knowledge that the sole reason which induced *L* to sell was to delay, hinder or defeat his creditors. Therefore *T* cannot be said to have acted in good faith when the assignment was made to him, and the assignment was accordingly absolutely void against the official assignee under section 51 of the Bankruptcy Ordinance;

(2) *T* did not act in good faith and was therefore not entitled to the protection of section 53 of the Bankruptcy Ordinance;

(3) as *L* was adjudicated a bankrupt on June 14, 1963 the bankruptcy was under section 46 of the Bankruptcy Ordinance deemed to have relation back to and to commence at the time of the first act of bankruptcy proved to have been committed within 6 months next proceeding the date of the presentation of the bankruptcy petition. The bankruptcy petition was presented on March 21, 1963 and the first act of bankruptcy committed within 6 months preceeding that date was the execution of the assignment on February 22, 1963 and the bankruptcy commenced on that date and under section 47 the property of the bankrupt divisible among his creditors included his equitable interest in the shophouse;

(4) when property under a mortgage is sold and a portion of the purchase price is utilised to discharge the mortgage, the purchaser of the property is entitled in equity to be treated as a mortgagee in respect of the mortgage debt paid out of the purchase money, if the sale is, subsequently, set aside and the purchaser is deprived of the property purchased by him. Applying this principle *T* was entitled to recover from the official assignee the sum of $23,594.44 which was the amount paid to the mortgagee bank out of the purchase price of $30,000 provided by *T;*

(5) *T* was not precluded from claiming the sum of $23,594.44 from the official assignee although it was part of the purchase price of $30,000 which was provided by him in pursuance of an illegal transaction, because there was nothing illegal about the purchase of the bank's legal estate in the shophouse.

Cases referred to:—

(1) *Re Anson Cycle & Motor Works* [1960] M.L.J. 171.

(2) *In Re Chop Tong Tuck Tai* 14 S.S.L.R. 117.

(3) *Clare* v. *Lamb & Ors.* (1875) 44 L.J. C.P. Reports (New Series) 177.

BANKRUPTCY.

K. S. Chung for the Official Assignee.

Punch Coomaraswamy for the respondent.

Cur. Adv. Vult.

Choor Singh J.: A receiving order was made against the firm of Yeow Heap Seng on 19th April 1963; and adjudication orders were made against Lim Kiat Kee and Sng Ting Wah as partners in the firm on 14th June 1963. The third partner, Lim Song Heng, was adjudicated a bankrupt on 21st June 1963.

This is a motion by the official assignee for a declaration that an assignment dated 2nd March 1963 and made between Lim Kiat Kee as vendor and Tan Teck Guan as purchaser of shop house No. 52 North Boat Quay, Singapore, is void against the official assignee. The grounds on which the motion is based are:—

(1) the assignment was not made in good faith or for valuable consideration;

(2) the assignment was an act of bankruptcy because it was fraudulent; and Lim's bankruptcy related back to it, and his property divisible among his creditors included the shop house.

On 12th August 1960 Lim Kiat Kee (whom I shall call Lim) mortgaged the shop house No. 52 North Boat Quay, which belonged to him, to the Bank of Singapore to secure the firm's overdraft on its current account with the bank up to a limit of $22,000.

The firm was in serious financial difficulties in February 1963. On 11th February 1963 the overdraft stood at $43,332.28. Debts due to other creditors amounted to some $140,000. The bank pressed the firm to reduce its overdraft to $22,000, failing which the bank threatened to sell the shop house by public auction to recover the amount of the overdraft.

On 16th February 1963, Lim instructed his partner, Sng, to go out and collect the debts due to the firm, as money was required on 20th February 1963 to pay the creditors of the firm. Lim also proceeded to do the same. Sng states that by the 18th of February 1963 he had collected $13,000 which he handed to Lim on that day. According to Sng, Lim collected during the same period over $30,000. It is alleged by Sng that Lim paid $9,624.13 only into the firm's account with the bank and misappropriated about $35,000. According to Lim, Sng collected $26,000 on 18th February 1963 from the firm's debtors and misappropriated this amount. For the purpose of these proceedings it is unnecessary to decide how much of the firm's money was misappropriated by Lim or Sng. I am satisfied that a large sum of money due to the firm was collected on behalf of the firm but was not paid into the firm's bank account.

As the firm failed to reduce its overdraft to $22,000, thirteen cheques drawn by the firm were dishonoured by the bank on 18th February 1963. Sng learned of this the next day and asked Lim for an explanation. Lim is alleged to have told him that the bank was pressing for payment of the amount due to it; that Lim intended to use the money collected from the firm's debtor to save his property which was mortgaged to the bank; and that as his property was mortgaged to secure the firm's overdraft, he was entitled to use the firm's money to redeem his property.

From the 20th to the 23rd of February a large number of creditors including the payees of the dishonoured cheques called at the firm's premises to demand payment of moneys due to them. Notices of demand were received from solicitors acting for the firm's creditors. All those who called at the firm's premises were told that the firm was in financial difficulties and intended to suspend payment of its debts. By the evening of 21st February almost all the firm's creditors knew that the firm was unable to meet its debts.

On 23rd February Sng gave notice in the presence of three creditors that the firm Yeow Heap Seng had suspended payment of its debts. This led to a bankruptcy petition being filed against the firm.

The facts relevant to the assignment of the shop house are as follows. In January 1963 Lim informed one Yeo Hong Siang, that the Bank of Singapore was pressing his firm for payment of an overdraft which was secured by a mortgage of his shop house, namely, No. 52 North Boat Quay, Singapore. Lim asked Yeo to find a buyer for this property so that he could utilise the proceeds of sale to discharge the overdraft.

In the middle of January 1963 Yeo informed the respondent, Tan Teck Guan, that Lim wanted to sell his shop house in North Boat Quay for $40,000, and that it was mortgaged to the bank which was pressing for payment because the overdraft limit set by the bank had been exceeded. Tan replied that he would consider the matter. He then consulted his solicitors. They obtained a valuation from a firm of licensed valuers. The valuers valued the property at $36,750. On 4th February 1963 Tan informed Yeo that a firm of professional valuers had valued the property at $36,750. Tan made an

offer of $30,000 for the property. This offer was conveyed to and accepted by Lim.

On 7th February 1963 a sale agreement was accordingly signed. And on 22nd February 1963 Lim signed the assignment transferring the property to the respondent, which the official assignee is now seeking to set aside. Lim executed the assignment in favour of the respondent and delivered it as an escrow pending completion of the reconveyance by the bank. The reconveyance was executed by the bank on 2nd March 1963 and the sale by Lim to the respondent was completed on that date.

The official assignee relies on two grounds to set aside the assignment. The first is based on section 51 of the Bankruptcy Ordinance. The relevant portions of the section are:—

> 51 (1) Any settlement of property, not being . . . . a settlement made in favour of a purchaser . . . . in good faith and for valuable consideration . . . . shall, if the settlor becomes bankrupt within two years after the date of the settlement, be absolutely void against the Official Assignee.
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> (3) For the purpose of this section "settlement" includes any conveyance or transfer of property.

The effect of this section was considered by the Singapore Court of Appeal in *Re Anson Cycle & Motor Works.*[1] The Court of Appeal held that upon the true construction of this section, a conveyance made either in bad faith or without valuable consideration is absolutely void against the official assignee; that the burden of proof is on the official assignee; and that if the official assignee shows that either valuable consideration or good faith on the part of the purchaser was lacking, he has discharged the onus of proving that the settlement is void under this section.

The official assignee contends that good faith on the part of the respondent was lacking because he acted in collusion with the bankrupt Lim who made the assignment fraudulently to delay, hinder or defeat his creditors.

There is no doubt that the firm was hopelessly insolvent on 22nd February 1963 when Lim signed the assignment. On that day the firm's account with the bank was overdrawn to the extent or $23,594.44. There was a sum of $140,000 due to other creditors of the firm. Lim must have known that bankruptcy was imminent. Nevertheless on the 22nd February 1963 he assigned the shop house to the respondent. It is reasonable to infer that he was intending to defraud his creditors and to save something from the wreck for himself. The sale of the property left him with $6,406 after paying the amount due to the bank on the mortgage. I have no hesitation in holding that the assignment in question was fraudulent as against the creditors of the firm. In fact, counsel for the respondent concedes that Lim was acting fraudulently when he signed the assignment, but contends that the respondent acted in good faith in purchasing the property from Lim.

It is necessary now to consider whether the respondent acted in good faith when the assignment was made to him. The state of affairs at the time of the assignment has already been described by me.

As to the sufficiency of the consideration, it is not denied that the broker, Yeo, specifically informed the respondent during the negotiations that Lim had bought the shop house in 1951 for $52,000 and that the bank was pressing Lim for payment of the overdraft. It is alleged that in that year due to the Korean war prices of immovable properties were high. According to the manager of the Bank of Singapore, the shop house was worth at least $40,000 in August 1960 and he fixed the limit of the overdraft at $22,000 in accordance with the policy of his bank to grant overdrafts up to half the value of the security. In his opinion the shop house was worth at least $40,000 in February 1963. Messrs. Kiong Chai Woon & Co. Ltd. were the licensed valuers who valued the property on 2nd February 1963 at $36,750 at the request of the respondent's solicitors. Unfortunately no one from this firm of valuers was called as a witness and it is not known how they arrived at this figure of $36,750. The respondent's estimate of the value of the shop house was $30,000. In my view the most reliable evidence before the court as to the value of the property at the time of its sale to the respondent is that of the bank manager. I therefore hold that the property was worth at least $40,000 when it was assigned by Lim to the respondent; and that the respondent paid only three-fourths of its real value.

Another factor which must be considered is the sale agreement signed on 7th February 1963. According to the respondent it was drawn up in Chinese to save costs. I do not accept this explanation as the respondent had earlier consulted his solicitors regarding the purchase of the shop house. Furthermore, the fact that no provision for a deposit was made in the Chinese agreement indicates that the respondent was acting in collusion with Lim.

The assignment was signed on 22nd February 1963. Messrs. Braddell Brothers who acted for both parties had not completed their searches and other investigations by that date and they therefore obtained from the respondent an indemnity in the following terms:—

> "With reference to the purchase by me of the above property from Lim Kiat Kee I hereby confirm that I have instructed you to complete the purchase by me of the same without having to make the usual enquiries from the City Council, the Chief Planner, the Comptroller of Property Tax and any other local Authority in respect of outstanding charges, notices or scheme affecting the

above property and I hereby release you from all liability and responsibility arising from the completion of the assignment in my favour of the above property and from any damage that may be suffered or incurred by me in consequence thereof."

It was alleged by the broker, Yeo, that the assignment was signed on 22nd February 1963 on the request of the solicitors, Messrs. Braddell Brothers. This can hardly be true. Messrs. Braddell Brothers received the title deeds of the property from Messrs. Wee Swee Teow & Co. who were acting for the bank, on 21st February and the assignment was signed by Lim the next day. The assignment could not have been prepared and signed in such haste without instructions from both Lim and the respondent. On the evidence before me I come to the conclusion that completion of the sale was expedited by the solicitors on the instructions of both Lim and the respondent. It is significant that the respondent was not only ready and willing to complete the purchase on 22nd February 1963 but was also willing to waive searches and sign the indemnity in favour of Messrs. Braddell Brothers. Why was he willing to take such risks? His explanation is that he wanted to accommodate Lim and save him paying interest to the bank on the overdraft. But the respondent himself had to borrow $22,000 from a bank and $10,000 from a friend to make up the purchase price. Evidently he had to pay interest to the bank on the money he borrowed and his explanation therefore is unacceptable.

Having considered carefully all the evidence before me in this case, I am fully satisfied that the respondent deliberately aided and abetted Lim in the fraud committed by Lim. The respondent knew that Lim was selling the property in order to delay, hinder or defeat his creditors. And to enable Lim to accomplish the fraud, the respondent instructed his solicitors to expedite the completion of the sale and for that purpose he waived all searches by his solicitors and gave them an indemnity. The urgency of the matter is explained by the fact that the firm suspended payment of its debts the day after the assignment was signed by Lim. In my judgment the evidence clearly indicates that the respondent accepted the assignment of the shop house with the full knowledge that the sole reason which induced Lim to sell was to delay, hinder or defeat his creditors. I hold therefore that the respondent cannot be said to have acted in good faith when the assignment was made to him; and that the assignment is accordingly absolutely void against the official assignee under section 51 of the Bankruptcy Ordinance.

I come now to the second ground on which the official assignee seeks to set aside the assignment; that the assignment was an act of bankruptcy because it was a fraudulent assignment and that the official assignee's title relates back to that act of bankruptcy because it was committed within six months next preceding the date of the presentation of the bankruptcy petition. In bankruptcy a particular significance has always been given to the word "fraudulent". A conveyance which would not be fraudulent when the parties are solvent can be fraudulent in a bankruptcy because the interests of the creditors have not been observed. And a bankrupt who makes a fraudulent conveyance commits an act of bankruptcy under section 3(1)(b) of the Bankruptcy Ordinance. In this case Lim was adjudicated a bankrupt on 14th June 1963. By virtue of the provisions of section 46 of the Bankruptcy Ordinance, the bankruptcy is deemed to have relation back to and to commence at the time of the first act of bankruptcy proved to have been committed within six months next preceding the date of the presentation of the bankruptcy petition. The bankruptcy petition was presented on 21st March 1963. The first act of bankruptcy committed within the six months preceding that date was the execution of the bankrupt's assignment on 22nd February 1963. On that date the bankruptcy commenced. Under section 47 of the Bankruptcy Ordinance the property of the bankrupt divisible among his creditors shall comprise all such property as belongs to or is vested in the bankrupt at the commencement of the bankruptcy. Under this section therefore the property of the bankrupt Lim, divisible among his creditors included his equitable interest in the shop house.

The next point that I have to consider is whether the respondent can invoke the protection of section 53 of the Bankruptcy Ordinance. This section, subject to certain exceptions, confers protection on certain transactions with the bankrupt on two conditions. The relevant parts of the section are:—

> "Subject to the foregoing provisions of this Ordinance with respect to the effect of bankruptcy on an execution or attachment, and with respect to the avoidance of certain settlements and preferences, nothing in this Ordinance shall invalidate in the case of a bankruptcy — any conveyance by the bankrupt for valuable consideration. . . .
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> Provided that (i) the . . . . conveyance . . . . takes place before the date of the receiving order; and (ii) the person . . . . to whom the . . . . conveyance . . . . was made has not, at the time of the . . . . conveyance, notice of any available act of bankruptcy before that time'.

The effect of this section was considered by the Singapore Court of Appeal in *Re Anson Cycle & Motor Works, supra.* The Court of Appeal held that this section gives no protection to any conveyance which is void under section 51 of the Bankruptcy Ordinance. As to the question whether it protects a conveyance from relation

back of the official assignee's title, it was held that besides the conditions laid down in the section, good faith is required on the part of the person to whom the conveyance was made. In the present case I am satisfied that the respondent did not act in good faith and is, therefore, not entitled to the protection of section 53 of the Bankruptcy Ordinance.

The next point for consideration is the submission by counsel for the respondent that if the assignment is now to be set aside and the shop house made available to the official assignee for the benefit of the bankrupt's creditors, the assignment should be set aside on terms. His argument is as follows: On 22nd February 1963, the day the assignment was signed, the bankrupt Lim had only an equitable interest in the shop house, the legal ownership being vested in the bank to whom a sum of $23,594.44 was due on a mortgage of the shop house. As the bank was a secured creditor, the official assignee could not have taken the shop house without paying $23,594.44 to the bank. This sum was repaid to the bank out of the purchase price of $30,000 provided by the respondent, who should therefore be reimbursed by the official assignee to the extent of $23,594.44 if the respondent is to be deprived of the shop house.

Counsel for the official assignee submitted that the purchase price of $30,000 came from Lim who provided this sum to the respondent on 21st February 1963 to complete the purchase; that it was for the purpose of raising money for payment of the purchase price that Lim instructed Sng to collect as much money as he could from the debtors of the firm; that the $30,000 paid as purchase price was in fact the firm's money collected from the debtors of the firm; that in purchasing the shop house the respondent took a calculated risk and cannot complain now because it has turned out to be an illegal sale; and that in any case, on the authority of *In Re Chop Tong Tuck Tai*,[2] the matter of reimbursement could not be dealt with in these proceedings.

On the evidence before me I am not prepared to hold that the purchase price of $30,000 which the respondent paid for the shop house was in fact the debtor firm's money or that it came from Lim, because in my view there is no evidence to support these allegations.

In *Re Chop Tong Tuck Tai*, the question of reimbursement was raised before the Straits Settlements Court of Appeal on somewhat similar facts but the court declined to give a ruling on the ground that the matter had not been fully dealt with, and there was no material before the court on which the court could make any order in the matter.

Here I must refer to a case which was decided by the Court of Chancery in 1875. The case has not been reported but a reference to it appears in the judgment in *Clare* v. *Lamb & Ors.*[3] In that unreported case the facts were these: *S* executed three mortgages of her leasehold properties. She subsequently married *L*. After the death of *L*, his executors sold the properties by auction in the *bona fide* belief that *L* was legally entitled to the equity of redemption. One Clare purchased the leasehold properties at the auction for £785. A considerable portion of the purchase price was expended in paying off the principal sums due on the three mortgages and interest thereon and the balance of £240 was received by *L's* executors; and they treated this sum as belonging to *L's* personal estate. Later *L's* widow discovering that the equity of redemption was in her, filed a bill in the Court of Chancery against Clare, impeaching the validity of the sale and of the assignment. By a decree of that court it was declared that the indenture of assignment, so far as the same purported to be an absolute assignment to Clare of the leasehold houses, was void as against the widow; and that Clare was entitled in equity to be considered as a mortgagee only of the leasehold houses in respect of the principal sums due on the three mortgages and interest thereon.

The principle that can be deduced from this decision would appear to be this: when a property under mortgage is sold and a portion of the purchase price is utilised to discharge the mortgage, the purchaser of the property is entitled in equity to be treated as a mortgagee in respect of the mortgage debt paid out of the purchase money, if the sale is, subsequently, for some reason, set aside and the purchaser is deprived of the property purchased by him. The reason for this principle is that in such a case, the vendor of the property would have been unable, in the first instance, to convey the legal fee simple in the property to the purchaser without first discharging the mortgage, and as the mortgage is discharged with the purchaser's money, he is therefore entitled, in equity, to step into the shoes of the mortgagee, if, and when, the sale to him is set aside. And the person who takes the property upon the setting aside of the sale has nothing to complain about. He gets the property subject to the same liability, as would have been the case had the abortive sale not taken place. This principle, is, in my view, clearly applicable to the facts of the present case; and the respondent who has now to give up the shop house to the official assignee is therefore entitled to receive from the official assignee the sum of $23,594.44 which was the amount paid to the mortgagee bank out of the purchase price of $30,000 provided by the respondent.

The question which now has to be considered is whether the respondent is precluded from claiming the sum of $23,594.44 from the official assignee by reason of the fact that it was part of the purchase price of $30,000 which was paid by him in pursuance of an illegal transaction. It has to be borne in mind that the transaction of the 22nd February 1963 in effect, involved two purchases. First, there was the purchase of the mortgagee bank's legal estate in the shop house for $23,594.44. Secondly, there was the purchase of the bankrupt mortgagor's equitable interest in the shop house for $6,405.56. In my view the transaction of the 22nd February 1963 was clearly illegal in so far as it involved the assignment of Lim's equitable interest in the shop house to the respondent. So far as the assignment of the equitable interest is concerned, I am satisfied that it was made with intent to defraud Lim's creditors as it was made a day before he suspended payment of his firm's debts. Lim, therefore, committed an offence under section 113(1)(b) of the Bankruptcy Ordinance. And the respondent was clearly a party to the illegality as he knew that Lim's intention was to defraud his creditors. There was, however, nothing illegal about the purchase of the bank's legal estate in the shop house. The respondent could have purchased it lawfully from the bank for the same sum i.e. $23,594.44. I therefore hold that the respondent is not precluded by law from claiming $23,594.44 from the official assignee.

For the above reasons it is declared and ordered that the assignment signed on 22nd February 1963 and dated the 2nd March 1963 is absolutely void against the official assignee under section 51 of the Bankruptcy Ordinance and it is declared and ordered that the said assignment was an act of bankruptcy under section 3(1)(b) of the Bankruptcy Ordinance and that the property of the bankrupt Lim divisible among his creditors includes his equitable interest in the shop house No. 52 North Boat Quay and upon payment of the sum of $23,594.44 by the official assignee to the respondent, the registrar of deeds is directed to expunge the entries made on the 4th day of March 1963 in the register of deeds of the registration of the said deed of assignment dated the 2nd day of March 1963 and the entries of the registration of the mortgage dated the 26th of November 1963 (registered in volume 1497 No. 24) and the reconveyance thereof, and it is ordered that the respondent pay to the official assignee the costs of and incidental to this application and also of the registration of this order in the register of deeds.

Order accordingly.

Solicitors: *Chung & Co.; Braddell Bros.*

HAJI EKSAM v. MALAYAN TRADERS CORPORATION

[O.C.J. (Ismail Khan J.) March 15, 1965]

[Malacca — Civil Suit No. 68 of 1962]

Practice and procedure — Notice of motion — No grounds of objection — Grounds of objection set out in affidavit — R.S.C. 1957, O. 70 r. 3.

The defendants sought to set aside a judgment for $25,000 entered against them in default of appearance. A preliminary point was taken for the plaintiff that the notice of motion did not set out the grounds of objection relied on and that there was non-compliance with O. 70 r. 3. The defendants argued that the object of O. 70 r. 3 was to give the other party notice of the case he had to meet, and in this case, the grounds for the application though omitted in the notice of motion were clearly set out in the affidavit.

Held: as the grounds of objection were fully set out in the affidavit and as both the notice of motion and the affidavit were served on the plaintiff at the same time, it could not be said that he was taken by surprise.

Cases referred to:—

(1) *Petty* v. *Daniel* (1887) 34 Ch.D. 172.

(2) *Baillie* v. *Goodwin & Co.* (1886) 33 Ch.D. 604.

CIVIL SUIT.

Tara Singh for the plaintiff.

C. Thambiah for the defendants.

Cur. Adv. Vult.

Ismail Khan J.: This is an application by motion in which the defendants seek to set aside a judgment for $25,000 entered against them in default of appearance.

A preliminary point was taken for the plaintiff that the notice of motion does not set out the grounds of objection relied on and that there is non-compliance with Order 70 rule 3 which reads:—

"When an application is made to set aside proceedings for irregularity, the several objections intended to be insisted upon shall be stated in the summons or notice of motion."

It is contended for the plaintiff that having so failed to set out their grounds of objection, the defendants cannot now rely upon them. My attention was drawn to the case of *Petty* v. *Daniel* [1] at p. 180.

For the defendants it was argued that the object of Order 70 rule 3 is to give the other party notice of the case he has to meet. In this case, the grounds for the application though omitted in the notice of motion are clearly set out in the affidavit; one of these being the invalidity of the service of the writ upon the defendants. There is nothing in the case cited by the plaintiff to indicate whether an affidavit was used in support of the application. There may be cases where an affidavit could be dispensed with. Where such is the case, it is only fair to the other party that the summons or